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16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA

18 SAN FRANCISCO DIVISION

19 ETOPIA EVANS, as the Representative of the ) Case No. 3:16-cv-01030-WHA  
20 Estate of Charles Evans, et al., )  
21 Plaintiffs, ) PLAINTIFFS' NOTICE OF MOTION AND  
22 vs. ) MOTION FOR CERTIFICATION AND  
23 ARIZONA CARDINALS FOOTBALL CLUB, ) ENTRY OF JUDGMENT UNDER FED. R.  
24 LLC, et al., ) CIV. P. 54(b) AND FOR A STAY OF  
25 Defendants. ) PROCEEDINGS  
26 ) Date: June 29, 2017  
27 ) Time: 8:00 a.m.  
28 ) Courtroom: 8, 19<sup>th</sup> Floor  
Honorable William Alsup

1 PLEASE TAKE NOTICE that on June 29, 2017 at 8 a.m., or as soon thereafter as the  
2 matter can be heard, in the courtroom of the Hon. William H. Alsup, located at 450 Golden Gate  
3 Ave., San Francisco, CA 94102, Plaintiffs will seek an order entering final judgment pursuant to  
4 Rule 54(b) of the Federal Rules of Civil Procedure as to the Court's May 15, 2017 Order (Dkt.  
5 No. 224, the "Order") granting defendants' (the "Clubs") motion to dismiss second amended  
6 complaint and for summary judgment on the individual claims of certain plaintiffs (Dkt. No.  
7 212) ("Motion").

8 Plaintiffs hereby request that the Court enter an order: (1) directing that final judgment  
9 with respect to the Order be entered except for the intentional misrepresentation claims of  
10 plaintiff Alphonso Carreker against defendants the Green Bay Packers, Inc. ("Packers") and PDB  
11 Sports, Ltd. ("Broncos") and the intentional misrepresentation claim of plaintiff Reggie Walker  
12 against defendant Chargers Football Company, LLC ("Chargers");<sup>1</sup> (2) determining that no just  
13 reason for delay exists for entry of final judgment with respect to the Order except for the  
14 Surviving Claims, or for an appeal from the Order; and (3) staying the current proceeding as of  
15 the date of the filing of the instant motion pending resolution of an appeal of the Order.

16 Plaintiffs have conferred with defendants concerning this motion, which they oppose.

17 **BACKGROUND**

18 The Motion sought to dismiss the second amended complaint for failure to state a claim  
19 or, in the alternative, summary judgment as to Plaintiffs' claims on the sole basis that they were  
20 time-barred. The Order dismissed all of Plaintiffs' claims against all Clubs save for those for  
21 intentional misrepresentation by Mr. Ashmore against the Raiders and Rams; Mr. Carreker  
22 against the Packers and Broncos; Mr. Graham against the Chargers; Mr. Harris against the  
23 Dolphins; Mr. Killings' claims against the Vikings; Mr. King against the Titans; Mr. Massey  
24 against the Saints and Lions; Mr. Walker against the Chargers and Mr. Wunsch against the  
25 Seahawks. The Order then granted summary judgment on statute of limitations grounds as to  
26 those claims that survived dismissal save for Mr. Carreker and Mr. Walker's claims.

27  
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<sup>1</sup> The non-dismissed surviving claims are referred to herein as the "Surviving Claims."

## **ARGUMENT**

**I. THE COURT SHOULD CERTIFY THE DISMISSED CLAIMS FOR APPEAL.**

3       “Federal Rule of Civil Procedure 54(b) allows a district court dealing with multiple  
4 claims or multiple parties to direct the entry of final judgment as to fewer than all of the claims  
5 or parties; to do so, the court must make an express determination that there is no just reason for  
6 delay.” *Curtiss Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 3, 100 S.Ct. 1460 (1980). “It is  
7 left to the sound discretion of the district court to determine the ‘appropriate time’ when each  
8 final decision in a multiple claims action is ready for appeal.” *Id.* at 8 (citation omitted); *see also*  
9 *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435, 76 S.Ct. 895 (1956). Before it can certify  
10 claims for appeal, a district court must determine that those claims have been finally disposed of.  
11 *Curtiss Wright*, 446 U.S. at 7 (“A district court must first determine that it is dealing with a ‘final  
12 judgment.’ It must be a ‘judgment’ in the sense that it is a decision upon a cognizable claim for  
13 relief, and it must be ‘final’ in the sense that it is ‘an ultimate disposition of an individual claim  
14 entered in the course of a multiple claims action.’” (quoting *Sears, Roebuck*, 351 U.S. at 436).

15        In *Sears, Roebuck*, the Supreme Court found that claims are not “so inherently  
16 inseparable from, or closely related to” one another as to preclude certification if “[t]hey  
17 certainly can be decided independently of each other.” *Sears, Roebuck*, 351 U.S. at 436. Here,  
18 the Order completely disposed of 11 of the 13 Plaintiffs’ claims against 29 of the 32 named  
19 defendants. As such, it demonstrates that such claims “can be decided independently” – indeed,  
20 they have been so decided – and thus constitutes the very type of judgment contemplated by Rule  
21 54(b) as that which can be certified for appeal.

22 “Once having found finality, the district court must go on to determine whether there is  
23 any just reason for delay.” *Curtiss Wright*, 446 U.S. at 7-8; *see also Schoenbart v. U.S. Bank*  
24 N.A., No. C 16-00070 WHA, 2016 U.S. Dist. LEXIS 92353, at \*8 (N.D. Cal. July 15, 2016)  
25 (“After determining finality, the district court must decide whether there is any just reason for  
26 delay by considering ‘judicial administrative interests as well as the equities involved.’”)  
27 (quoting *Curtiss Wright*) (Alsup, J.). In this case there is no just reason for delay.

1        In the Ninth Circuit, “Rule 54(b) certification is proper if it will aid expeditious decision  
2 of the case.” *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991) (quotes omitted).  
3 Certification is thus appropriate where, as here, a district court disposes of the core of a  
4 plaintiff’s case, leaving claims that by themselves may not warrant the expense of trial. For  
5 example, in *Piney Woods Country Life School v. Shell Oil Co.*, 726 F.2d 225 (5th Cir.), the  
6 district court disposed of the bulk of the claims, leaving plaintiffs with a claim to a relatively  
7 small amount of natural gas. The court of appeals observed that “[t]he only thing left for the  
8 plaintiffs to do in the district court is to present lengthy evidence on the market value of the small  
9 amount of gas . . . . The plaintiffs’ potential recovery would not justify the expense of this  
10 proof.” *Id.* at 230. Because the remaining claims were not worth the expense of further  
11 proceedings, the court of appeals agreed “that the district court acted wisely and in the interests  
12 of ‘sound judicial administration’ in certifying the case at this stage.” *Id.* (quotes omitted).

13        Certification has also been granted to avoid the specter of duplicative trials. *See, e.g.*,  
14 *Cullen v. Margiotta*, 811 F.2d 698, 711 (2d Cir. 1987); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 70  
15 (2d Cir. 1977); *Chamberlain v. Harnischfeger Corp.*, 516 F. Supp. 428, 430 (E.D. Pa. 1981).

16        Here, if the claims are not certified, Plaintiffs will be forced either to dismiss the  
17 Surviving Claims with prejudice and take an appeal or to try those claims. On the one hand,  
18 Plaintiffs should not have to try the Surviving Claims by themselves as they constitute but a  
19 fragment of the claims in the Second Amended Complaint that hardly warrant the expense of  
20 going to trial. On the other hand, Plaintiffs should not be forced to dismiss the Surviving Claims  
21 with prejudice simply to keep moving forward with the remainder of their case. And if the  
22 appeal is successful, by certifying those claims now and staying the Surviving Claims, the  
23 specter of duplicative trials is avoided.

24        Rule 54(b) certification would simplify and expedite the disposition of this case, and  
25 Plaintiffs submit that an immediate appeal should be taken in the interest of judicial economy  
26 and efficient administration of this case. Put simply, the interests of sound judicial  
27 administration and efficiency will be best served if Plaintiffs are permitted to take an immediate  
28 appeal. There really is no just reason for delay.

1       Indeed, this Court has entered final judgment under Rule 54(b) where the claims of some  
2 but not all of the named defendants have been dismissed, as is the case here. *See, e.g.*,  
3 *Schoenbart*, 2016 U.S. Dist. LEXIS 92353, at \*7-9 (granting motion for entry of final judgment  
4 after dismissing claims against one defendant); *Hung v. Tribal Techs.*, No. C 11-04990 WHA,  
5 2014 U.S. Dist. LEXIS 159262, at \*10 (N.D. Cal. Nov. 12, 2014) (“Because Glenborough will  
6 be dismissed from this action as a defendant, and because this order expressly determines that  
7 there is no just reason for delay, this order is hereby certified as appealable and final pursuant to  
8 Federal Rule of Civil Procedure 54(b).”).

9       Accordingly, for the foregoing reasons, Plaintiffs respectfully request the Court to enter  
10 judgment pursuant to Fed. R. Civ. P. 54(b) expressly determining that there is no just reason for  
11 delay and directing the Clerk to enter the judgment forthwith.

12 **II. THE REMAINING CLAIMS SHOULD BE STAYED.**

13       A “district court has broad discretion to stay proceedings as an incident to its power to  
14 control its own docket,” *Clinton v. Jones*, 520 U.S. 681, 706, 117 S.Ct. 1636 (1997) so as to  
15 promote the fair and efficient adjudication of a proceeding, *see, e.g.*, *Gold v. Johns-Manville  
Sales Corp.*, 723 F.2d 1068, 1077 (3d Cir. 1983); *see also Matek v. Murat*, 638 F. Supp. 775, 784  
16 (C.D. Cal. 1986) (stating that if a district court certifies claims for appeal pursuant to Rule 54(b),  
17 it should stay all proceedings on the remaining claims if the interests of efficiency and fairness  
18 are served by doing so). Courts must consider the time and effort of counsel and the litigants  
19 with a view toward a policy of avoiding piecemeal litigation. *Landis v. North Am. Co.*, 299 U.S.  
20 248, 254, 57 S.Ct. 163 (1936).

22       Courts traditionally consider four factors when determining whether to grant a stay of  
23 existing claims pending the appeal of other, dismissed claims: (1) the likelihood of the moving  
24 party’s success on the merits; (2) whether the moving party will be irreparably injured if a stay is  
25 not granted; (3) whether a stay will substantially injure the opposing party; and (4) the public  
26 interest. *See Nken v. Holder*, 556 U.S. 418, 426, 129 S.Ct. 1749 (2009). Taken as a whole, these  
27 factors favor staying the few remaining claims in this matter.

28

1           As to factor one, Plaintiffs expect at this time that their appeal would focus on the Court's  
2 decision to grant summary judgment on statute of limitations grounds, which Plaintiffs  
3 respectfully submit was in error. The Maryland Court of Appeals has stated that "the statute of  
4 limitations should not begin to run until the plaintiff knows or through the exercise of due  
5 diligence should have known of injury, its probable cause, and either manufacturer wrongdoing  
6 or product defect." *Pennwalt Corp. v. Nasios*, 314 Md. 433, 452 (1988);<sup>2</sup> *see also Hecht v.*  
7 *Resolution Trust Corp.*, 333 Md. 324, 336 (1994); *Frederick Road Ltd. Partnership v. Brown &*  
8 *Strum*, 360 Md. 76, 96 (2000) ("Thus, before an action is said to have accrued, a plaintiff must  
9 have notice of the nature and cause of his or her injury. ..."); *United Parcel Serv., Inc. v.*  
10 *People's Counsel for Baltimore Cty.*, 336 Md. 569, 579 (1994), (holding that "a cause of action  
11 "accrues" when "the plaintiff knows or should know of the injury, its probable cause, and ... [the  
12 defendant's] wrongdoing ..."). Plaintiffs contend that this Court misread the foregoing case law  
13 and ignored Plaintiffs' well-pled allegations that they were not aware that the Clubs caused their  
14 injuries – causation being, along with liability and damages, necessary to establish a tort – until  
15 March 2014, *see, e.g.*, Dkt. No. 189 at 6, and evidence offered in the form of interrogatory  
16 answers and deposition testimony buttressing the foregoing allegations and raising a genuine  
17 issue of fact precluding summary judgment, *see, e.g.*, Dkt. No. 216 at 28 – 35. In short, the  
18 Court should not have granted summary judgment, and thus, there is a strong likelihood of  
19 success on the merits.

20           Factors two and three also favor a stay. The Clubs have already deposed all the named  
21 Plaintiffs and received all documents they requested and which are in the named Plaintiffs'  
22 possession, custody, or control and not privileged (save, perhaps, for documents that the parties  
23 have agreed will be provided on a set schedule as part of Plaintiffs' continuing duty to  
24 supplement). Thus, the Clubs do not face a situation where, should the dismissed claims be

25           <sup>2</sup> In fact, *Doe v Archdiocese of Washington*, 114 Md. App. 169, (1997), one of two lower  
26 court decisions relied on in the Order, quoted the *Pennwalt* rule cited above. In the other lower  
27 court case cited in the Order, the Court of Special Appeals held that a change in the law by the  
28 Court of Appeals did not start a new limitations period, noting specifically "In this case, there  
was no assertion by the appellants that Aetna had fraudulently concealed facts from them."  
*Moreland v Aetna U. S. Healthcare , Inc.*, 152 Md. App. 288, 299 (2003).

1 revived on appeal, they have lost years during which documents might be lost and memories  
2 might fade. And the Clubs have had ample time to conduct their own investigation and thus do  
3 not face a situation where information in their possession might be lost or destroyed with the  
4 passage of time. And while Carreker and Walker may not be irreparably injured if the stay is not  
5 granted, it is undeniably more efficient for all involved to have those claims tried at the same  
6 time as any claims that survive after the appeal.

7 Finally, while the public interest favors the swift administration of justice, accuracy and  
8 completeness should not be sacrificed for arbitrary, internal trial court deadlines to resolve  
9 matters. Of paramount importance in any legal proceeding is getting it right, lest the public lose  
10 faith in the system should error occur. And if in fact Plaintiffs are right, it will conserve less  
11 judicial resources to have all the claims tried at one time, rather than Mr. Carreker's and Mr.  
12 Walker's claims against only three of the Clubs in October 2017 and the remainder when they  
13 come back from appeal, during which time the Court can focus its efforts on resolving other  
14 matters, all of which inures to the public's interest. This factor thus favors the movants as well.

15 **CONCLUSION**

16 For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order  
17 granting the relief requested herein.

18 DATED: May 31, 2017

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